

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 451 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

-----

PUNABHAI H PARMAR

Versus

STATE OF GUJARAT

-----

Appearance:

MR PM VYAS for appellant.

MR MA BUKHARI,A.P.P. for Respondent.

-----

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 16/12/96

ORAL JUDGEMENT: (Panchal,J.):-

By means of filing this appeal under section 374(2) of the Code of Criminal Procedure, 1973 the appellant has questioned validity of judgment and order dated June 30, 1989, rendered by the learned Sessions

Judge, Sabarkantha at Himatnagar, in Sessions Case no. 2/89 convicting him under sections 302 & 201 of the Indian Penal Code and sentencing him to R.I. for life under section 302 I.P.C. as well as R.I. for 3 years and fine of Rs.200/- i/d. S.I. for six months under section 201 I.P.C. It may be mentioned that substantive sentences are ordered to run concurrently.

2. Chandrakant T. Tikotkar, who was then Station Master of Talod Railway Station, was on duty at Railway Station from 6.00 a.m. to 2.30 p.m. on November 11, 1988. At about 8.00 a.m. one Point Man named Devpuri Shambhupuri approached Tikotkar and informed that a corpse was lying near the Home-Signal. On receiving the information, Station Master asked another Point Man named Mangalsingh to accompany Devpuri and verify the fact. After verification, Mangalsingh informed Mr. Tikotkar that in fact, a corpse was lying near the Home-Signal. Station Master, therefore, went to the place where corpse was lying. He found that corpse was of Dinesh Joshi and vultures were nibbling the dead body. The Station Master asked one gang-man named Ranabhai to keep watch over corpse and returned to the station, from where he flashed a message to Talod Police Station. At Talod Police Station, Jujarsinh Hamirsinh Rathod received the message which was reduced into writing and entered into police station diary.

November 10, 1988 was a New Year day according to Hindu calendar and people were moving from place to place to greet relatives and friends. Deceased Dinesh Nanalal Joshi was 4th amongst six brothers. His native place was village Mahiyal, which is situated at a distance of 10 minutes walk from Talod Railway Station. Name of his elder brother is Krishnakant Nanalal Joshi. Son of Krishnakant i.e. Anil is working in Yewla Beedi Factory situated at Talod and was commuting daily between village Mahiyal and Talod. When Anil was going to the place of work, he found several persons gathered near Home-Signal of Talod Railway Station and went there out of curiosity. He immediately recognised that the deceased was his uncle. He, therefore, rushed back to village Mahiyal and informed his father i.e. Krishnakant that his uncle was lying dead near Home-Signal. On receiving information from his son, Krishnakant went to the place where dead body was lying, but found that police had not reached the place. He, therefore, went to Talod Police Station to lodge a complaint. When he reached police station, the message received from Station Master Tikotkar was being noted in the station diary. The complaint given by Krishnakant Joshi was also recorded. P.S.I. Mr. Karanjiya of Talod Police Station went to the spot and

held inquest on the dead body. Thereafter the dead body was sent to Civil Hospital. Himatnagar for autopsy. The investigating officer also prepared panchnama of place of occurrence and recorded statements of witnesses who were found to be conversant with the facts of the case. Initially, the case was registered as an accidental death. After preliminary investigation, papers of investigation were forwarded to Ahmedabad Railway Police Station, as offence had taken place within the limits of Talod Railway Station.

P.S.I. Mr. Chaudhary of Western Railway Police Force was entrusted with the investigation. He recorded statements of witnesses and also received information that a eunuch named Kalli was having relations with the appellant. By the time, medical officer, Himatnagar Civil Hospital indicated the cause of death of the deceased to P.S.I. Mr. Chaudhary. On the basis of autopsy report, which indicated that deceased died a homicidal death, P.S.I. Mr. Chaudhary lodged complaint at Railway Police Station, Ahmedabad under section 302 I.P.C. The investigation was taken over by Police Inspector Bhimsinh Gulabsinh Khant of Railway Police Station, Ahmedabad and offence of murder was registered at Railway Police Station vide C.R.No.389/88. P.I. Mr. Khant came to Talod, visited the site of offence and recorded statements of other witnesses. On November 17, 1988, the appellant was arrested and interrogated by the investigating officer. Pursuant to the information provided by the appellant, a rubble was discovered and panchnama under section 27 of the Indian Evidence Act was prepared. During the course of investigation it was revealed that the appellant was residing with eunuch Kalli. Therefore, house of eunuch Kalli was also searched, which resulted into recovery of mud stained godadi (a thin quilt), langot (a piece of cloth being worn around loins) etc. and those articles were attached under a panchnama. Incriminating articles were sent to Forensic Science Laboratory for analysis.

3. After receipt of report from Forensic Science Laboratory and on completion of investigation, the appellant was chargesheeted under sections 302, 201 of I.P.C. in the court of learned Judicial Magistrate, First Class, Prantij. As the offences are exclusively triable by Court of Sessions, the case was committed to Sessions Court for trial and it was numbered as Sessions Case no.2/89. The learned Sessions Judge framed charge at exh.3 against the appellant under sections 302 & 201 of I.P.C. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Chandrakant T. Tikotkar, PW.1, exh.18, (2) Devpuri

Shambhupuri, PW.2, exh.9, (3) Krishnakant Nanalal Joshi, PW.3, exh.10, (4) Rampalsinh Kamalsinh Chaudhary, PW.4,exh.11, (5) Shankerji Kodarji, PW.5,exh.12, (6) Kanti @ Kalavati Mathurbhai, PW.6, exh.13, (7) Dali Keshavlal, PW.7, exh.14, (8) Pratapsinh Gumansinh Jhala,PW.8, exh.15, (9) Mafaji Nemaji, PW.9, exh.18, (10) Dr. Manish Amaraji Suvera, PW.10, exh.20, (11) Shravandasji Parmeshwardasji, PW.11, exh.24, (12) Mohanmal Parshottamdas PW.12, exh.25, (13) Laxmanbhai Mathurbhai, PW.13, exh.26, (14) Jujarsinh Hamirsinh Rathod, PW.14, exh.27, (15) Vakhatsinh Dahyabhai, PW.15,exh.30, (16) Maganbhai Nanabhai,PW.16, exh.32, and (17) Bhimsinh Gulabsinh Khant, PW.17, exh.33, to prove its case against the appellant.

4. The prosecution also relied on documentary evidence, such as,panchnama of place of occurrence exh.7,discovery panchnama of stone prepared under section 27 of the Indian Evidence Act exh.16, postmortem notes of the deceased exh.23, report of the Forensic Science Laboratory etc. to prove its case against the appellant.

5. The learned Sessions Judge questioned the appellant generally on the case and recorded his statement under section 313 of the Code of Criminal Procedure,1973 after recording of evidence of prosecution witnesses was over. In his further statement, the appellant claimed that deceased Dinesh Joshi was his friend. The appellant admitted that on the date of incident, he in the company of deceased had gone to the house of Shankerji Kodarji,who had procured liquor for them which was consumed by him and the deceased. The appellant stated in his further statement that as he was under influence of intoxication, Laxmanbhai Mathurbhai had left him at the house of Kalli with whom he was residing. He claimed that he was not aware of the fact as to who had opened the lock applied on the door of the house of Kalli, as he was intoxicated. He offered an explanation that his clothes were stained with blood and mud, as he had a fall in the mud. He claimed that he had not asked Kalli to wash off his clothes. He admitted that after incident he had gone to Ahmedabad for the purpose of sale of liquor.He denied the case of prosecution that he had made any extra-judicial confession before Kalli. He also claimed that in fact he was arrested on November 14,1988 and not on November 17,1988 as claimed by the prosecution. The appellant further stated that he had separated from deceased Dinesh Joshi at about 7.00 p.m. on November 11,1988 and did not know as to where Dinesh Joshi had gone. He also filed written statement at exh.40. In his written statement,

the appellant claimed that several males were visiting house of Kalavati and were taking liquor. He admitted that he was procuring liquor from Shankerji and was dealing in the same. He claimed that he was left at the house of Kalavati by brother of Kalavati and had instructed him to lock the door from outside and hand over keys to him through window, as he had entertained a reasonable apprehension that police would raid the place if information was given by Laxman i.e. brother of Kalavati. He claimed that on the date of incident, deceased Dinesh Joshi was with him till 7.00 p.m. and he did not know as to where the deceased had gone thereafter.

6. The learned Judge noted that no evidence of any eye witness was relied on by the prosecution to bring home guilt to the appellant and the case solely rested on circumstantial evidence. On appreciation of evidence, learned Judge held that following circumstances were proved by the prosecution beyond reasonable doubt. (1) Deceased Dinesh Joshi met with a homicidal death because of strangulation, (2) Deceased Dinesh Joshi and the appellant were friends, (3) Evidence of Shankerji Kodarji PW.5, exh.12 shows that the appellant was last seen in the company of the deceased going towards the place from where dead body was found, (4) Kalavati, PW.6, exh.13 was room companion of the appellant and the appellant had confessed before Kalavati that he had strangled the deceased with langot, (5) After the incident, the appellant had stayed during night at the house of Kalavati and washed off mud stained clothes, (6) the evidence regarding extra-judicial confession led by the prosecution is trustworthy, (7) the report of Forensic Science Laboratory proves that blood found on godadi and langot of the appellant was of 'B' group which was also the blood group of the deceased, (8) the report of Forensic Science Laboratory further shows that mud found on the godadi and langot of the appellant was of the same variety as that of control sample collected from the place of occurrence, (9) discovery of blood of same group and mud of the same variety on the langot of the appellant indicates that the appellant was in close proximity of the deceased when he was throttled to death and this circumstance is not explained by the appellant either in his further statement or in the written statement. After recording above-referred to conclusions, the learned Judge further held that the facts established are of conclusive nature as well as tendency and are consistent only with the hypothesis of guilt of the appellant. The learned Judge found that chain of circumstantial evidence was so complete as not

to leave any reasonable ground for the conclusion consistent with the innocence of the appellant. The learned Judge, therefore, concluded that in all human-probability the offence was committed by the appellant alone. In view of these findings, the learned Judge convicted the appellant under sections 302, 201 I.P.C. and imposed sentences on him which have been referred to earlier, giving rise to the present appeal.

7. Mr. P.M.Vyas, learned Counsel for the appellant has taken us through the entire evidence on record. It was claimed that the circumstances from which the conclusion of guilt is drawn are not fully established and, therefore, benefit of doubt should be given to the appellant. It was contended that facts established by the prosecution are not consistent with the hypothesis of guilt of the appellant and, therefore, the impugned judgment should be reversed. It was emphasised that chain of circumstantial evidence is not complete so as not to leave any reasonable ground for conclusion consistent with the innocence of the appellant and, therefore, the appeal should be allowed. In the alternative, it was pleaded that the appellant was under the influence of drink and was incapable of forming intention to cause death of the deceased, which would bring his case under section 304 Part-II I.P.C. and, therefore, appeal should be partly allowed and the sentence imposed should accordingly be modified.

8. Mr. M.A.Bukhari, learned A.P.P. stressed that the circumstances from which conclusion of guilt is drawn are fully established and the facts so established are consistent only with the hypothesis of guilt of the appellant, as a result of which the appeal should be dismissed. It was claimed that the facts established are not explainable on any other hypothesis except that the appellant is guilty and as chain of circumstances established is complete, findings recorded by the learned Judge should be upheld and conviction as well as sentence imposed on the appellant should be affirmed. The learned Counsel for the State Government argued that there is no evidence to show that the appellant was suffering from any incapacity to form requisite intention mentioned in section 302 I.P.C. and, therefore, the appeal should not be accepted in part as claimed by the learned Counsel for the appellant.

9. The fact that deceased Dinesh Joshi met with a homicide death due to throttling is not disputed before us on behalf of the appellant. The inquest panchnama exh.6, death report exh.22, statement of witnesses,

contents of postmortem notes produced by Dr.Suvera are sufficient to establish the fact beyond reasonable doubt that deceased Dinesh died due to injuries which were not self-inflicted. The evidence of Dr. Suvera shows that he had received dead body at about 11.45 a.m. and performed postmortem on the dead body. The clothes were found to have been stained with blood and mud; whereas the upper two incisors had been uprooted due to injuries on the left side of the face. The medical officer has enumerated external as well as internal injuries in detail found on the dead body not only in his evidence, but also in the postmortem notes prepared by him. The medical officer has categorically stated that there was fracture of thyroid cartilage and the deceased died because of asphyxia resulting from throttling. Having regard to the nature of evidence led by the prosecution, we are of the view that finding recorded by the learned Judge that the deceased died a homicidal death, is eminently just and is hereby upheld.

9. It is an admitted fact that the prosecution has not led direct evidence i.e. the evidence of any eye witness to bring home guilt to the appellant and the case is solely based on circumstantial evidence. The essential ingredients to prove guilt of an accused by circumstantial evidence are; (i) the circumstances from which the conclusion is drawn should be fully proved, (ii) the circumstances should be conclusive in nature, (iii) all the facts so established should be consistent only with the hypothesis of guilt of accused and inconsistent with his innocence, (iv) the circumstances should, to moral certainty exclude the possibility of guilt of any other person than the accused. In the light of these principles, we would now proceed to examine the question whether the prosecution has proved its case against the appellant beyond reasonable doubt.

10. The first circumstance which is relied on by the prosecution is that the deceased and the appellant were friends. Devpuri Shambhupuri, PW.2, exh.9, who is linesman at Talod Railway Station, has stated in his evidence that the appellant and deceased Dinesh Joshi were known to each other. Similarly, Shankerji Kodarji, PW.5, exh.12 has also stated in his evidence that the appellant and the deceased were friends. The evidence of Kanti @ Kalavati Mathurbhai PW.6, exh.13 unerringly points out that the appellant and the deceased were friends. The appellant in his further statement has also admitted that the deceased was his friend. Though the witnesses have been cross-examined at length, nothing has been brought on record to discredit their version that

the appellant and the deceased were friends. On the facts and in the circumstances of the case, we are of the opinion that the prosecution has proved it beyond reasonable doubt that the appellant and the deceased were known to each other since long and had befriended each other.

11. The next circumstance which is relied on by the prosecution against the appellant is that he was last seen in the company of the deceased. In order to prove this circumstance, the prosecution has relied on the evidence of (1) Devpuri Shambhupuri, PW.2, exh.9, (2) Shankerji Kodarji, PW.5, exh.12, and (3) Mohanmal Parshottamdas, PW.12, exh.25. Witness Mohanmal Parshottamdas stated that he runs Jayvijay Hotel and Lodge near Talod Railway Station. In his evidence, he stated that on the New Year Day of 1988 which was on November 10, 1988, he had opened his Hotel at about 5.00 p.m. and the deceased had visited his hotel at about 6.00 pm. The witness claimed that after a while deceased Dinesh was joined by the appellant and had demanded food, but as food was not prepared on the New Year Day, both of them had left his hotel. In his cross-examination, the witness deposed that over and above the appellant and deceased Dinesh, 4 to 5 other persons had also visited his hotel in the evening. He deposed before the Court that deceased Dinesh appeared to be drunk when he had visited the hotel, but he was not able to say whether the appellant was under the influence of drink or not. This witness was contradicted with his police statement wherein he had stated that the appellant was also drunk. The evidence of Shankerji Kodarji PW.5, exh.12 indicates that his house is situated near Talod Railway Station and at the relevant time was running a Tea Stall. This witness testified that on New Year Day the deceased and the appellant had visited his house and consumed liquor. The witness, in no uncertain terms, claimed that after consuming liquor, both of them had proceeded on railway track towards Amarapura. In his cross-examination, the witness was sought to be contradicted. However, the contradiction which is brought on record is not material at all. In cross-examination, the witness maintained that deceased Dinesh was used to drink liquor. There is no cross-examination so far as his material evidence is concerned, which indicates that after 7.00 p.m. on the New Year Day deceased Dinesh and the appellant had visited his house, consumed liquor and had gone towards Amarapur. The evidence of Devpuri Shambhupuri, PW.2, exh.9 indicates that at the relevant time he was serving as Linesman at Talod Railway Station and was on duty from 8.00 a.m. to 8.00 p.m. The witness claimed that when he



was going to his house after duty hours, the deceased and the appellant had met him and both of them were under the influence of drink. The witness stated that on seeing him, deceased Dinesh invited him to consume liquor and celebrate the New Year Day. The witness claimed that he told the deceased and the appellant that he was not consuming liquor and went to his house. In his cross-examination the witness maintained that the deceased and the appellant were friends. Though these three witnesses have been searchingly cross-examined, nothing has been brought on record of the case to discredit their version before the Court that the appellant was last seen in the company of the deceased. It is not demonstrated that any of the witnesses is on inimical terms with the appellant. They have no reason to give false and fabricated evidence against the appellant, as none of them is either related to the deceased or to the complainant, who is brother of the deceased. The evidence of these three witnesses establishes beyond reasonable doubt that not only the accused and the deceased were absolutely known to each other, but were last seen in the company of each other and had proceeded towards Amarapur, which is near the place from-where dead body of deceased Dinesh Joshi was recovered. There is no manner of doubt that the deceased and the appellant were companion of each other and both had consumed liquor on the New Year Day. Their behaviour and movement after consumption of liquor were observed and they were found to be moving from place to place. The evidence led by the prosecution unerringly and clinchingly establishes that the appellant and the deceased were the only two persons going towards the place from-where dead body of the deceased was recovered and no third person was in their company. Ordinarily, when a person is accused of committing murder of another, the fact that the accused and the deceased were last seen alive in company of each other and the failure of the accused to satisfactorily account for the disappearance of the deceased is considered a circumstance of an incriminating nature. In the facts of the case, the incriminating circumstance that the appellant and the deceased were seen alive in company of each other, is not explained by the appellant at all. It means that the appellant and the deceased were together upto the time of incident and appellant had all opportunity of committing murder of the deceased.

12. Yet another circumstance which is relied on by the prosecution is in the nature of extra-judicial confession made by the appellant before eunuch Kalavati. Witness Devpuri Shambhupuri in his evidence has stated

that the appellant was residing with a eunuch. The evidence of eunuch i.e. Kanti @ Kalavati Mathurbhai is recorded at exh.13. Village Mahiyal is just adjoining Talod Railway Station. The evidence of witness Kanti shows that he is eunuch and known as Kalavati. The witness claimed before the Court that he had come in contact with the appellant before five months of the incident and very often both of them used to go to Ahmedabad together for the purpose of consuming liquor. The evidence of Kanti establishes that the appellant was residing with him and one of the keys of the house used to be with the appellant; whereas second key used to be retained by him. The witness claimed that on Diwali day the appellant did not return Home and on New Year Day he had gone to Dehgam for collecting alms. The witness stated that at about 11.00 p.m. when he returned to his house, he found the appellant lying on a cot on which a godadi was spread. His evidence shows that he was in the company of another eunuch named Dali and when he tried to interrogate the appellant, the appellant refused to speak out, as Dali was present. The witness has clearly stated that when Dali left his house, he questioned the appellant and the appellant confessed that he had a quarrel with deceased Dinesh Joshi. The witness has claimed that the appellant asked him to wash off his blood and mud stained clothes, but he refused to do so, as it was late in the night. The witness has testified that when he got-up in the early morning next day, he found that clothes were washed by the appellant. The witness deposed that next day the appellant left his house for Ahmedabad and he himself went to Ahmedabad on the second day where he had contacted the appellant at the Platform. The witness has claimed that on seeing him, the appellant made inquiry as to whether his name was disclosed with reference to the incident of quarrel that had taken place between him and deceased Dinesh Joshi or not. The witness further claimed that he asked the appellant to swear and state as to what had actually happened. The witness has clearly informed the Court that thereupon the appellant confessed before him that he was over drunk and had caused injuries to the deceased by means of rubble and thereafter strangulated him by means of his langot. This witness was cross-examined by the learned Counsel for the appellant at length. The witness admitted in his cross-examination that the appellant was in the habit of drinking liquor. In cross-examination, the witness claimed that formerly the appellant was dealing in liquor, but stopped doing so after he came in his contact. The suggestion made by the defence that the appellant had informed the witness that he had fallen down and sustained injuries, was denied. The witness also denied

the suggestion that no extra-judicial confession was made by the appellant before him. It is relevant to note that no further cross-examination of this witness was undertaken at all on behalf of the accused. The fact that after the incident the appellant had gone to the house of this witness stands proved as it is corroborated by the evidence of Dali exh.14 as well as Laxmanbhai Mathurbhai PW.13, exh.36, who is brother of Kanti Kalavati. The evidence of Kanti gets corroboration from other independent evidence also. Kalli and the appellant were room partners. The statement made by the appellant before Kalli at Asarwa Railway Police Station is a confessional statement which is an incriminating evidence against the appellant. The fact that on the New Year Day the appellant had stayed over in the house of witness Kanti, is also deposed to by Laxman Mathur. It is but natural that on noticing that clothes of the appellant were blood and mud stained, Kanti would interrogate the appellant. The confessional statement made by the appellant before witness Kanti also gets corroboration from the medical evidence because the medical evidence shows that the deceased died due to throttling and there were other injuries which could have been caused by a rubble. The position of the person to whom confession is alleged to have been made in relation to the person making confession, time lapse between the occurrence and the making of confession and the circumstances in which the confession is alleged to have been made are some of the relevant factors which need to be taken into account while appreciating such evidence. Though normally extra-judicial confession is a weak type of evidence, it cannot be called a weak evidence if it withstands the following tests; (1) is the witness proving the confession generally credible; (2) is his relation with the accused such that the latter would confide in him; (3) is there any motive for the witness to implicate the accused falsely; (the witness might be lying to save himself or someone else by laying the blame on the accused); (4) is the confessional statement consistent with other facts and circumstances brought on record.

Judged in the light of the above referred to tests, we find that the evidence of witness Kanti, who has proved the confession, is credible. His evidence stands corroborated by the evidence of Dali as well as Laxman Mathur in material particulars. His relations with the accused were such that the latter would confide in him. There is no motive for the witness to implicate the accused falsely. It is not brought on the record of the case to indicate that Kanti is lying to save himself or someone else by laying the blame at the door step of

the appellant. As noted earlier, the confessional statement is consistent with other facts and circumstances brought on record and more particularly, medical evidence. The extra-judicial confession is reproduced by the witness in the exact words of the appellant. Having regard to the circumstances, like (i) person to whom it was made, (ii) the connection, if any, of the accused with him, (iii) the occasion or reason for the accused to go and make such a confession to him; and (iii) the circumstances in which it was made, we are of the opinion that the extra judicial confession is voluntary and free from any inducement, threat or promise and is a reliable piece of evidence. The relationship between the appellant and witness Kanti was most cordial and intimate and, therefore, the appellant would repose confidence in the witness. On the facts and in the circumstances of the case, we are of the view that no error is committed by the learned Judge in holding that the prosecution has proved extra-judicial confession made by the appellant, which is a reliable piece of evidence.

13. The last circumstance, which is sought to be relied on by the prosecution is that the clothes of the appellant were stained with blood having same group as that of the deceased and were also found to have been stained with mud which was of the same variety as that of the control sample collected from the place of occurrence. The panchnama of place of occurrence is produced by the prosecution at exh.7. It is exhibited with consent of the parties. The panchnama clearly indicates that in presence of panch witnesses, blood stained mud, control mud and two human teeth were recovered from the place of offence. The panchnama also indicates that muddamal articles recovered from the place were attached and sealed in presence of independent witnesses. The evidence of witness Pratapsinh exh.15 shows that house of witness Kanti @ Kalavati was searched in presence of the appellant, from-where bushirt and pant appearing to have been washed recently as well as godadi and a langot which were blood and mud stained, were recovered. The evidence of investigating officer indicates that incriminating articles were sent to Forensic Science Laboratory for analysis along with a covering letter exh.34 in a sealed condition.. Exh.35 is the report of Forensic Science Laboratory, Ahmedabad. The report indicates that muddamal articles were received in properly sealed condition by the Forensic Science Laboratory. The report makes it abundantly clear that blood group of the deceased was 'B' and group of blood found on godadi as well as langot was also 'B'. The report further indicates that mud was also examined at

the Laboratory and it was established that mud found on the godadi and the langot was of the same variety as that of control sample collected from the place of occurrence. The report further indicates that mud which had soiled the jabbha and langot of the deceased was also of the same variety as found on the godadi on which the appellant had been sleeping after the incident and the langot which he was wearing. Thus, in our view, direct link has been established between dead body of the deceased and the appellant by the report of the Forensic Science Laboratory, which makes it abundantly clear that the appellant was in close proximity of the deceased when the deceased was strangled to death.

14. In view of the above discussion, we are of the opinion that circumstances from which conclusion of guilt of the appellant is to be drawn are fully proved. Weighed as an integrated whole the circumstances proved are conclusive in nature. While scrutinising the evidence on record we have guarded ourselves against the danger of allowing conjecture or suspicion to take place of proof. Every evidentiary circumstance proved is a strong probative link and link after link forged firmly by credible testimony has formed a strong chain of sure guilt binding the appellant. Each link taken separately may just suggest but when hooked on to the next and on again has manacled the appellant inescapably. All the facts established by the prosecution are consistent only with the Hypothesis of guilt of the appellant and totally inconsistent with his innocence. The circumstances to a moral certainty exclude the possibility of guilt of any person other than the appellant. Combination of facts proved, have created a net without there being any tear through which the appellant can escape. Under the circumstances, we are of the opinion that finding recorded by the Trial Court that the appellant is perpetrator of crime in question, is eminently just and proper and deserves to be affirmed. However, we find that both i.e. the appellant and the deceased had consumed liquor on the New Year Day. The appellant was under so much influence of intoxication that witness Laxman Mathur had to leave him at the house of Kanti Kalavati. The fact that the deceased and the appellant had consumed liquor on the New Year Day is also stated by Shankerji Kodarji PW.5, exh.12. Thus, there is no manner of doubt that the appellant was heavily drunk and intoxicated at the time of incident. Where the intention with which an act is done is a material factor in determining the criminality of the act, it is obvious that question whether accused was intoxicated at the time of the alleged offence and what was the degree and nature

of intoxication are relevant circumstances to be taken into consideration. A voluntary drunkard, who commits an offence can be attributed the same knowledge as he would have as if he had not been, in fact, intoxicated. In the case of voluntary intoxication, the accused is presumed to have the same knowledge as if he had not been intoxicated. Having regard to the facts and circumstances of the case, we are of the opinion that prosecution has failed to lead evidence to indicate that the appellant had formed requisite intention as mentioned in section 302 I.P.C. The facts of the case on the contrary show that heavy drunkenness on the part of the appellant had incapacitated him from forming requisite intention as required by section 302 I.P.C. It is well settled that where a particular intention is essential to constitute an offence and the accused by reason of intoxication, was incapable of forming the particular intention necessary to constitute the offence, he will not be guilty of that offence in spite of the fact that intoxication was voluntary. Having regard to the attendant circumstances and the fact of intoxication, we are of the view that the appellant is liable to be convicted under section 304 Part-II of the Indian Penal Code and his conviction under section 302 I.P.C. is liable to be set aside.

The appellant is also convicted under section 201 I.P.C. for causing disappearance of evidence of offence. The testimony of Kanti @ Kalavati Mathurbhai, PW.6 exh.13 establishes beyond reasonable doubt that on the date of incident when the witness had gone to his house, the appellant was found sleeping on a cot and after confessing that he had assaulted the deceased the appellant had requested Kanti to wash off his clothes, which were blood and mud stained. The evidence of Kanti further shows that he had refused to wash the clothes of the appellant, as it was late in the night and in the morning he had found that the appellant had washed off the clothes. The panchnama of search of house of witness Kanti indicates that pant and bushirt appearing to have been recently washed were discovered and attached in presence of independent witnesses. The report of F.S.L. shows that clothes which were washed off, had blood stains, but blood was found insufficient for the purpose of analysis. On the facts and in the circumstances of the case, we are of the opinion that the learned Sessions Judge has rightly concluded that after committing the offence, the appellant caused disappearance of evidence of offence and committed the offence punishable under section 201 I.P.C. The conviction of the appellant and sentence imposed on him

under section 201 I.P.C. are well-founded and will have to be upheld.

For the foregoing reasons, the appeal partly succeeds. Conviction of the appellant under section 302 I.P.C. recorded by the learned Sessions Judge, Sabarkantha at Himatnagar, in Sessions Case no.2/89 as well as sentence imposed for the said offence, are hereby set aside and quashed. Instead the appellant is convicted under section 304 Part-II of I.P.C. We have heard the learned Counsel appearing for the parties on the question of sentence. We are informed by the learned Counsel for the appellant that the appellant is in custody since November 17, 1988. Thus, the appellant is in jail for a period of more than 8 years. Without deciding the question of adequacy of sentence we are of the opinion that interest of justice would be served if the appellant is sentenced to the period of imprisonment already undergone by him. We accordingly sentence him to the imprisonment for the period already undergone by him. Though conviction and sentence of the appellant under section 201 I.P.C. are upheld, it is relevant to note that the learned Judge had directed the substantive sentences to run concurrently. As the appellant has undergone the sentence imposed on him for the offences punishable under section 304 Part-II and 201 of the Indian Penal Code, jail authorities are directed to set him at liberty forthwith, unless required in any other case. The appeal accordingly stands partly allowed in terms of the above order. Muddamal be disposed of in terms of directions given by the learned Judge in the impugned judgment.

=====